United States Court of Appeals

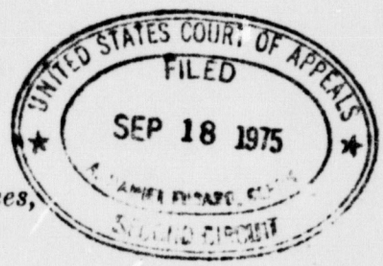
for the Second Circuit

APPELLEE'S BRIEF

74-2596

United States Court of Appeals

For the Second Circuit



MILDRED F. WOLF and HARRY WOLF,

Plaintiffs-Appellees,

against

INTERNATIONAL FOODS, a division of INTERNATIONAL INDUSTRIES, INC.,

Defendant,

against

CHARLES KRAMER and HENRY H. DILLOF, individually and as co-partners practicing law under the firm name and style of KRAMER & DILLOF,

Defendants-Appellants.

B
P/S

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF PLAINTIFFS-APPELLEES

GREENBAUM, WOLFF & ERNST
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PRELIMINARY STATEMENT

In this proceeding defendants-appellants appeal from an order of The Honorable Dudley B. Bonsal, United States District Judge, Southern District of New York, entered on November 13, 1974, which denied thier motion to implead as third-party defendants Greenbaum, Wolff & Ernst and Edward Garfield, Richard M. Ader, James L. Adler, Jr., R. Andrew Boose, Joseph Erdman, Morris L. Ernst, Maurice C. Greenbaum, Roger Bryant Hunting, Wirth H. Koenig, Frederic S. Nathan, Harriet F. Pilpel, Irwin Jay Robinson, Leo Rosen, Alan U. Schwartz, Nancy F. Wechsler, John A. Wiener, Herbert A. Wolff, Jr., Herbert A. Wolff, individually and as co-partners practicing law under the firm name and style of Greenbaum, Wolff & Ernst, and Allan P. White.

RESPONDENTS' POSITION

Neither Greenbaum, Wolff & Ernst nor any of the co-partners thereof was engaged by the plaintiffs until after the running of the three year statute of limitations governing the claims of the plaintiffs for personal injuries sustained by plaintiff Mildred Wolf on October 7, 1968; their first representation of the plaintiffs was

to file suit for damages for malpractice against defendants-appellants, Kramer & Dillof, for failure to commence a timely personal injury action. They had no duty of care to observe with regard to the plaintiffs' claim against International Foods, and were in no way involved in the handling of such claim or in referring it to Kramer & Dillof. Therefore, Greenbaum, Wolff & Ernst would not be liable to Kramer & Dillof for any part of a judgment which might be awarded plaintiffs against defendants-appellants.

Edward Garfield was not negligent with respect to the claim of plaintiffs against International Foods and, thus, as a matter of law, would not be liable to defendants-appellants for any part of a judgment which might be awarded to the plaintiffs against defendants-appellants.

Ergo, the order appealed from, being founded on a proper view of the law, should be affirmed.

FACTS

This action arises from the failure of Kramer & Dillof to properly and timely commence an action for damages for personal injuries sustained by plaintiff

Mildred F. Wolf, and for resultant damages for medical expenses and loss of services incurred by plaintiff Harry Wolf, her husband, on October 7, 1968, when Mrs. Wolf bit into a hamburger served to her at the International House of Pancakes, Manhasset, New York, and severely and permanently injured her teeth and mouth on a rusty piece of wire imbedded therein. (Pp. 7a-15a)*.

Shortly thereafter, plaintiff sought the help of their old friend and attorney, Edward Garfield. After completing the initial preparatory work and making preliminary attempts to negotiate a settlement with the restaurant's claim representative, Mr. Garfield, who is not a negligence lawyer, arranged to have the case handled by specialists in negligence law. (44a). On May 21, 1970, he telephoned the offices of Kramer & Dillof, who had prosecuted his various clients' negligence cases for many years, in order to arrange for the representation of Mr. and Mrs. Wolf in this matter, and in another, unrelated claim for damages for personal injuries to be asserted against Daitch Crystal Dairies. He spoke with

*References are to Appellant's Index.

a Miss Danihy who was and still is employed by Kramer & Dillof as their office manager. Miss Danihy asked that he forward his files in each of these matters to her. On May 22, 1970, both files were forwarded to the attention of Miss Danihy. Thereafter, on May 25, 1970, he forwarded some additional medical information to Miss Danihy for inclusion in the file in the companion claim to be asserted against Daitch Crystal Dairies. (45a).

Periodically thereafter he made telephone inquiries of Miss Danihy as to the status of these matters, a practice he had followed during the many years of his relationship with Kramer & Dillof. (45a).

In the course of one of these telephone inquiries of Miss Danihy, Mr. Garfield was informed that both matters were being handled by Allan P. White, an attorney employed by Kramer & Dillof. Miss Danihy suggested that he speak with Mr. White as to the status of the matters, since Mr. White was personally familiar with them. (45a).

In March of 1971, in responding to one such request, Mr. White informed Mr. Garfield that suit had been commenced in both cases. (46a). In subsequent inquiries which Mr. Garfield made of Kramer & Dillof, he was repeatedly informed by both Miss Danihy and Mr. White that both

of these matters were being actively prosecuted. (11a). In all of his conversations with Mr. White, it was Mr. Garfield's distinct understanding that Mr. White was handling the Wolf cases as an employee of Kramer & Dillof. Not until the summer of 1973 did Mr. White, defendants-appellants, Miss Danihy or anyone else, for that matter, advise Mr. Garfield of defendants' contention that Mr. White had been handling the Wolf cases as an independent attorney. (46a).

Defendants-appellants' motion for leave to serve a third-party complaint, not their answer to the complaint, raises for the first time the assertion that Mr. Garfield ". . . referred the said negligence action of Mildred F. Wolf and Harry Wolf which forms a basis for their complaint to the third-party defendant Allan P. White." (40a). The facts, however, indicate otherwise. Mr. White's emergence as attorney for the plaintiffs was not arranged by Mr. Garfield, by anyone acting on his behalf, or by the plaintiffs. (46a-47a). In engaging Mr. White to act as attorney of record for the plaintiffs, Kramer & Dillof did so without Mr. Garfield's knowledge, and without his authorization. (47a).

POINT I

MR. GARFIELD WAS NEVER A PARTNER IN THE FIRM OF GREENBAUM, WOLFF & ERNST.

In thier moving papers in the court below, defendants-appellants allege that Mr. Garfield was and is a partner in the law firm of Greenbaum, Wolff & Ernst.

The affidavit in opposition to said motion sworn to on August 30, 1974 by Roger Bryant Hunting, a partner in the firm of Greenbaum, Wolff & Ernst at all times hereinmentioned, clearly indicates that Mr. Garfield never was and is not presently a partner in the firm of Greenbaum, Wolff & Ernst. Further, it clearly states that Mr. Garfield was not in any way associated with the firm of Greenbaum, Wolff & Ernst until May 1, 1971, when he became affiliated with said firm in the capacity of counsel.

Despite and in complete disregard of the fact that they were thus informed of the relationship which actually exists between Mr. Garfield and Greenbaum, Wolff & Ernst and of the time at which such association arose, the defendants-appellants continue to ignore reality and resort again to a fantasy of their own making vis-a-vis the "partnership" of Mr. Garfield and the co-partners of the firm of Greenbaum, Wolff & Ernst. The court may

take judicial notice of the Martindale-Hubbell listings of New York City attorneys which confirm the fact that Mr. Garfield is listed as (1) a partner of another firm, Garfield, Salomon & Mainzer, for the years 1968 and 1969, (2) the sole member of his own firm, Edward Garfield, (with two associates) in 1970, (3) an independent practitioner for the year 1971 and (4) counsel for the firm of Greenbaum, Wolff & Ernst for the listings for 1972 to the present time. A further check of Martindale-Hubbell would show that from 1972 to the present Mr. Garfield is listed in the capacity of counsel under the biographical section for Greenbaum, Wolff & Ernst and is not listed in this section prior to the 1972 listings.

In spite of this defendants-appellants state to this court that "Mr. Garfield, on the date of the Plaintiffs' initial contact, was a partner or an agent, servant and/or employee of the firm of Greenbaum, [Wolff & Ernst]." Appellants' Brief, p. 3.

Defendants-appellants state that "a timely application for impleader should be granted except when the third-party claim obviously lacks merit. . .." (emphisis added). Appellant's Brief, p. 6. We submit

that the above-described manufacturing of a partnership or other relationship between Mr. Garfield and the firm of Greenbaum, Wolff & Ernst in 1968, 1969, 1970 is a pregnant example of the obvious lack of merit of appellants' claims.

POINT II

GREENBAUM, WOLFF & ERNST DID NOT REPRESENT THE PLAINTIFFS MILDRED F. WOLF OR HARRY WOLF UNTIL AFTER THE STATUTE OF LIMITATIONS HAD RUN, AND THUS CANNOT BE HELD LIABLE FOR NEGLIGENCE IN HAVING FAILED TO COMMENCE A TIMELY SUIT IN THAT MATTER.

The cause of action in Mildred F. Wolf and Harry Wolf v. International Foods, a division of International Industries arose on October 7, 1968.

Plaintiffs engaged their attorney, Edward Garfield, shortly thereafter to assert their claim against International Industries.

On May 21, 1970, Mr. Garfield contacted Kramer & Dillof in order to refer this negligence case to them, as they were attorneys who specialized in such cases.

Mr. Garfield was not a partner of or in any other way connected or associated with the firm of Greenbaum, Wolff & Ernst on either October 6, 1968 or

May 21, 1970.

Mr. Garfield's only connection with Greenbaum, Wolff & Ernst arose on May 1, 1971 when he became associated with the firm in the capacity of counsel. He has been associated with the firm in that capacity since that date.

Greenbaum, Wolff & Ernst did not have any connection with the Wolfs, until after the statute of limitations had run in their action against International Foods. They thereafter became attorneys for the Wolfs in the present malpractice action against defendants, Kramer & Dillof. Since they had no involvement with the Wolfs until said time, they had no duty of care to which they could be held vis-a-vis the case of Wolf v. International Foods.

POINT III

THIS IS NOT A PROPER CASE FOR IMPLEADER UNDER RULE 14(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE

In National Fire Insurance Co. of Hartford v. Daniel J. Keating Co., 35 F.R.D. 137 (W.D. Pa. 1964), cited by appellants, the court was faced with a situation where defendants denied any liability and sought

to implead several other parties as third-party defendants whom defendants claimed were either individually or jointly liable to plaintiffs. The court held that this was not a situation in which impleader would be permitted under Rule 14(a), Fed. R. C. P. 28 U.S.C. Noting that the third-party complaint charged the third-party defendants with "sole, or joint and several liability to the plaintiffs . . ." the court held:

> "A third-party complaint does not lie under such circumstances. Such facts may be shown by the original defendant at trial under its general denial of liability. A third-party complaint may be maintained only in cases in which the third-party defendant would be liable secondarily to the original defendant in the event the latter is held liable to the plaintiff. The deficiency in this third-party complaint is more than a technicality that can be remedied by the usual liberal view of pleadings taken in the federal courts, since by amendment in 1946 an express provision in Rule 14 for tendering an additional defendant to the plaintiff was deleted. The 1946 amendment limits its application to cases of secondary liability to the original defendant. No longer is it possible to bring in a person simply because he is or may be liable to the plaintiff." Id. at 139.

In the present case, defendants-appellants' pleadings allege that the case was never referred to them, but was referred directly to Mr. White. They take the position that they are not involved and that

all liability rests upon the proposed third-party defendants, either individually or jointly. Thus their position is identical to that taken by the defendant in National Fire Insurance Co., supra, and their motion for leave to implead the proposed third-party defendants was similarly, properly denied.

Appellants also cite Ford Motor Co. v. Milby, 210 F. 2d 137 (4th Cir. 1954), which holds that if a defendant alleges that his liability is based upon the negligence of one whom he seeks to implead as a third-party defendant, then only very unusual circumstances will justify a court in denying the joinder of such third-party defendant.

In the present case, appellants deny in their Answer that they were ever retained to represent the plaintiffs. This is consistent with the pleadings in their proposed third-party complaint. If appellants were never retained by plaintiffs, they would have no liability regardless of whether or not any of the proposed third-party defendants were negligent. Therefore, Ford would be inapplicable.

However, in the proposed third-party Complaint, appellants assert in paragraph SEVENTH, that if they are found to have been negligent, then they are entitled to

be indemnified by Greenbaum, Wolff & Ernst. Should this occur, then clearly, appellants would have had to have been retained by plaintiffs, and they therefore would have had a duty to commence an action before the statute of limitations had run. Having failed to do so, they would then be liable for their own negligence. Such liability would not be based on the negligence of the proposed third-party defendants. Thus, the holding in Ford, supra, would still be inapplicable.

POINT IV

IN THE INSTANT CASE THE DISTRICT COURT CORRECTLY APPLIED THE LAW WITH RESPECT TO THE LIABILITY OF A REFERRING ATTORNEY, EDWARD GARFIELD.

Appellant also relies on the holding in Ford supra, that if the trial judge in the exercise of his discretion, denies a motion to allow the impleading of a third-party defendant and such denial is based on an erroneous view of the law, that decision should not be allowed to stand. In the present case the denial of the motion to implead was based on a proper view of the relevant law.

In Wildermann v. Wachtell, 149 Misc. 623, 267

N.Y.S. 840 (Sup. Ct. 1933) aff'd. 241 App. Div. 812, 271 N.Y.S. 954 (1st Dept. 1934) the Court held that a New York attorney was not liable for the negligence of a Pennsylvania attorney to whom he had referred a case. The New York attorney referred the collection of an unliquidated claim to the out-of-state attorney. The New York attorney was to have received part of the contingency fee. Because of the negligence of the Pennsylvania attorney, a lis pendens was never filed and the judgment that was finally secured was worthless. The court found that the referring attorney, having exercised due care in recommending the Pennsylvania attorney, was not liable for the foreign attorney's negligence. In its conclusion the Court stated that to find the referring attorney liable would be to "impose an impossible burden upon practicing attorneys". Wildermann v. Wachtell, supra, at 842.

The fact that that case involved an out-of-state attorney in no way makes it less relevant to the instant situation. The Court of Appeals has held that:

> "When counsel who are admitted to the bar of this State are retained in a matter involving foreign law, they are responsible to the client for proper conduct of the matter, and may not claim that they are not required to know the law of the foreign state". In

re Roel, 3 N.Y. 2d, 224, 165, N.Y.S. 2d 31, appeal dismissed, 355 U.S. 604 (1957).

In Wildermann v. Wachtell, supra at 841, the Court states that both attorneys knew of the requirement of the filing of a lis pendens. Nevertheless, the Court did not find the referring attorney negligent. Likewise, in the instant situation the District Court correctly found that although both Garfield and Kramer & Dillof knew of the need to file suit before the statute of limitations had run, Garfield could properly assume that Kramer & Dillof would do so. Further in the instant case Garfield sought and received assurances the action had been timely commenced.

Based on Wildermann and Roel, supra, it thus appears that as a matter of law Mr. Garfield may not be held liable for the negligence of Kramer & Dillof in failing to commence an action on behalf of the Wolfs before the statute of limitation had run.

POINT V

MR. GARFIELD WAS NOT A JOINT VENTURER WITH EITHER KRAMER & DILLOF OR MR. WHITE.

The case of Hill v. Curtis, 154 App. Div. 662, 139 N.Y.S. 428 (2d Dept. 1913), cited by appellants, is

totally inapposite. The Court's finding of a joint venture was premised on an entirely different factual situation. Two attorneys had entered into a written agreement outlining the nature of their collaboration in the litigation of certain claims. The agreement provided that the parties "shall together undertake the prosecution of said claims" and that "each party hereto will give as much of his time to the prosecution of said claims, as may be necessary and it is further agreed that each party hereto will pay one-half of the expenses that may be incurred." Hill v. Curtis, supra at 663.

The facts in our case are clearly different, e.g., there is no written agreement, no agreement to share expenses and Mr. Garfield had already done all the work which he was to do at the time Kramer & Dillof accepted it as a referral from Mr. Garfield. Therefore, there is no basis for appellant's contention that Garfield and Kramer & Dillof were joint venturers.

POINT VI

THE QUESTION OF THE TIMELINESS OF DEFENDANTS-APPELLANTS' MOTION FOR LEAVE TO SERVE A THIRD-PARTY SUMMONS AND COMPLAINT IS NOT RELEVANT TO THIS APPEAL.

Since neither appellants nor respondents herein

raised the issue below of whether or not the motion to serve a third-party summons and complaint was timely made, it is not an issue relevant to this appeal.

CONCLUSION

FOR THE REASONS SET FORTH HEREIN, RESPONDENTS RESPECTFULLY REQUEST THAT THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DENYING THE MOTION OF DEFENDANTS-APPELLANTS TO IMPLEAD RESPONDENTS AS THIRD-PARTY DEFENDANTS BE AFFIRMED.

Respectfully submitted,

GREENBAUM, WOLFF & ERNST
pro se, and as
Attorneys for
Edward Garfield and
Plaintiffs-Appellees,
Mildred F. Wolf and Harry Wolf

Of Counsel:

Roger Bryant Hunting
Ira M. Fundy
Leonard Weinstein

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